SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1940

S. Mayner Wallace

Petitioner

vs.

Johanna F. Fiske, *et al.*

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vs.

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Brief in Support of Petition for Writs of Certiorari

A

The Opinions of the Court Below

The opinion (R. 22) of the Court of Appeals, refusing to dismiss respondents' appeal and dismissing petitioner's cross-appeal, is reported as Fiske, *et al.* v. Wallace and Wallace v. Fiske, *et al.*, 115 F. (2d) 1003.

The opinion (R. 42) of the Court of Appeals, affirming the judgment on respondents' (or the main) appeal, is reported as Fiske, *et al.* v. Wallace, 117 F. (2d) 149.

B

Jurisdiction

A full statement, concerning the jurisdiction, appears in the annexed Petition under the title "Jurisdictional Statement" and the same, and the authorities there cited, are not, in the interest of brevity, here repeated.

The following additional cases, however, also sustain the principle for which petitioner contends in his argument to the effect that the order of the Court of Appeals, dis-

missing his said cross-appeal, was not final or reviewable here while the respondents' (or the main) appeal was pending below in the Court of Appeals:

Winters v. Ethell, 132 U. S. 207, 210
McLish v. Roff, 141 U. S. 661, 667-8
Ex parte Railroad Co., 95 U. S. 221, 225
Rogers v. Hill, 289 U. S. 582, 586-7
Oneida Nav. Corp. v. Job & Co., 252 U. S. 521, 522
Chicago, G. W. R. R. Co. v. Basham, 249 U. S. 164, 167

C

Statement of the Case

A full statement of the case appears under the title "Summary and Short Statement of the Matter Involved" in the annexed Petition and, in the interest of brevity, is not now repeated.

D

Specification of Errors

1. The Court of Appeals erred in dismissing petitioner's cross-appeal (upon the ground that same was not taken within 3 months after the date of the judgment in the District Court notwithstanding the pendency there of petitioner's motion to amend that judgment); and

2. The Court of Appeals erred in refusing to dismiss for want of jurisdiction (upon the ground that same was prematurely taken from a non-final judgment in the District Court) the said main appeal of the respondents; and

3. The Court of Appeals also erred, in each of the foregoing particulars, because of its failure to accord legal significance to the fact that the law ordinarily disregards fractions of a day—a principle which, if applied, would have automatically resulted in sustaining petitioner's said cross-appeal and in dismissing respondents' said main appeal.

E

Argument

I

The Court of Appeals Was in Error in Ruling That, Under the Federal Rules of Civil Procedure, an Appeal to It from the District Court May Validly Be Taken at any Time During the 10-Day Period Following Judgment Within Which Period Another Party Has the Right to Move to Amend the Judgment or to Move for a New Trial

Prior to the adoption of the FEDERAL RULES OF CIVIL PROCEDURE, there was, of course, no statutory time limit for moving against a judgment; and, furthermore, an appeal was required to be allowed by the judge of the trial court and that fact operated as a check on the taking of a too hasty appeal.

Now, however, under RULE 73 (a), such an appeal is taken merely by the filing of a notice in the clerk's office.

RULE 52 (b), under which petitioner moved in the trial court, reads:

> "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for new trial pursuant to Rule 59. * * *".

That RULE, in the April, 1937, Draft—the Draft immediately preceding the one that was finally adopted by this Court—was numbered 59 (b) and read:

> "Upon motion of a party made within 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. *The pendency*

*of the motion does not affect the finality of the judgment or suspend its operation; * * *.''* (*Italics* ours.)

That last sentence was stricken by this Court from the present RULES; and, as is said in MOORE'S FEDERAL PRACTICE, Volume 3, page 3120:

> "This provision was stricken on the theory that the motion should have such an effect."

In other words, the pendency of such a motion does affect the finality of a judgment and does suspend its operation and, necessarily, makes premature any attempt to appeal therefrom while the judgment is thus non-final.

The foregoing legislative history would seem to be conclusive of the error of the Court of Appeals in its contrary view; for, if the finality of the judgment be suspended by such a motion filed within 10 days, that judgment is necessarily non-final prior thereto.

Other provisions of the present RULES also contemplate that such a judgment does not become final during the 10-day period following its entry.

RULE 59:

> (a) "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of

law or make new findings and conclusions, and direct the entry of a new judgment."

(b) "A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence."

(Seemingly, in the case of a motion bottomed upon newly discovered evidence, while the judgment becomes final 10 days after its entry, yet, thereafter, a non-final character may be restored to it by the prescribed procedure).

RULE 59 (d) provides:

"Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

(Under the opinion of Court of Appeals, in the event of a quick notice of appeal the trial court stands deprived of that power.)

Under RULE 60, providing for "Relief from Judgment or Order", the court, upon a motion made "within a reasonable time", during six months, may, for mistake, etc., grant relief against a default judgment—but that RULE also provides:

"A motion under this subdivision does not affect the finality of a judgment or suspend its operation."

(Contrasted with other provisions, the last quoted provision is highly significant.)

RULE 62 (a) reads:

> "Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. * * *".

Therefore, under the present RULES, a judgment, during the 10-day period, stands in suspense and any attempted appeal therefrom, during that time, is premature.

We have been unable to find that this question, here presented, has been considered in the Federal forum in any case other than this one; but the principle involved would appear to be exactly the same under identical provisions of State legislation.

In Missouri, a motion for new trial is required to be filed within 4 days after judgment; and it has long been firmly settled in that State that, during said statutory period, a judgment is interlocutory and is not appealable:

> Cox v. Frank L. Schaab S. & F. Co., 332 Mo. 492, 497, 58 S. W. (2d) 700, 701
> Lee's Summit B. & L. Ass'n. v. Cross, 345 Mo. 501, 507, 134 S. W. (2d) 19, 22 (2d col.)
> Holland v. Marshall (Mo. App.), 181 S. W. 124

The FEDERAL RULES OF CIVIL PROCEDURE have, as we understand, all the force of legislation and are to be given the same effect as if the RULES had been enacted directly by the Congress; and, as the RULES are later than any Act of Congress governing appeals, the latter, in so far as there might be any conflict, stands amended by the RULES.

The ruling of the Court of Appeals necessarily means that any party litigant, by immediately filing notice of appeal, can nullify, to a very material extent, the effectiveness and operation of the RULES; for it would seem to be without the spirit as well as the letter of the RULES to allow any party, effectively, to give notice of appeal, in any or every

case, immediately after the entry of judgment and thereby prevent all reconsideration in the trial court.

The view (R. 26) of the Court of Appeals is that the remedy of the other party, in event he desires the trial court to reconsider something, is first to go to the Court of Appeals and secure a remand for that purpose.

It is respectfully submitted that that cannot be the intent of the RULES. That course invites delays, useless work in the Appellate Court, is cumbersome and seems otherwise wholly inadmissible. The RULES, instead of simplifying procedure, would, in such case, complicate procedure.

It is also respectfully submitted that the two cases cited (R. 25) by the Court of Appeals (from the Court of Appeals for the seventh and fourth circuits) do not tend to support the view that such a judgment, as entered in the trial court, was appealable during said 10-day period, because those Courts considered no such question as we now have here.

II

If the View That Fractions of a Day Are Not Ordinarily Regarded by the Law Be Applied, It Automatically Follows That the Court of Appeals Dismissed the Wrong Appeal

We also respectfully submit that a sound (independent) view is that, because of the law's disregard, ordinarily, for fractions of a day, the filing of petitioner's motion to amend and the filing of the notice of appeal by the respondents, in the District Court, should, legally and practically, be viewed as simultaneous acts. (Same were, as already shown, filed just 2 hours and 5 minutes apart.)

If so, that notice of appeal meant nothing and has never possessed legal significance.

Fractionem diei non recipit lex—"The law does not take notice of a portion of a day". Black's Law Dictionary; and see Blackstone's Commentaries, vol. 2, p. 141.

This Court has observed—by MR. JUSTICE HOLMES:

> "The fiction that a day has no parts is a figurative recognition of the fact that people do not trouble themselves without reason about a nicer division of time."
>
> Burnet v. Willingham L. & T. Co., 282 U. S. 437, 440

Some agreement with the common law rule is now indicated by the FEDERAL RULES OF CIVIL PROCEDURE themselves where, in RULE 6 (a), it is provided that:

> "A half holiday shall be considered as other days and not as a holiday."

Among the cases, dealing with the above referred to rule of the common law and supportive of our position, are:

Sandy MacGregor Co. v. Vaco Grip Co. (C. C. A. 6), 2 F. (2d) 655, 656 (2d. col.)

Empire Lighting Fixture Co. v. Practical Lighting Fixture Co. (C. C. A. 2), 20 F. (2d) 295, 297 (1st. col.)

Suppose counsel for the petitioner and counsel for the respondents had appeared, on April 9, in the clerk's office, at the same time and that (instead of the time differential of 2 hours and 5 minutes) a dispute had arisen over which one filed his paper first? Isn't it true that no court, in such a situation, would hesitate a moment in ruling that that notice of appeal was nil? Then, why should the 2 hours and 5 minutes make any difference—or any period of time less than 1 day?

The time element here could just as well have been 5 seconds. Where (if a fraction of a day is to be considered)

would the Court, in cases like this, draw a line—so to speak?

It should be borne in mind that there was no reason whatsoever why respondents should have filed their notice of appeal on April 9 and, also, that there was no reason whatsoever why they should not have filed another notice of appeal when petitioner's motion to amend was later determined on July 25.

The foregoing consideration prevents any successful contention, in this case, that the said common law rule should, because of any exception to that rule, be deemed inapplicable here.

Viewing the situation as of the day when we must view it—that is, as of April 9—respondents then (because of that rule) acquired nothing whatever that they were entitled to keep. Theirs was not then a completed act nor did they, in the circumstances, secure, on that day, any vested right nor were they then even in the position of asserting a right to any conflicting claim. On that day, they moved, as stated, wholly without reason; and the fact that it is now too late for them to appeal cannot operate to allow them to cling to that hasty notice of appeal which, when filed, was (we respectfully submit) completely ineffective on each of the two grounds argued in this Brief.

Now, to hold otherwise, operates to deprive petitioner who pursued—we also respectfully submit—the orderly and lawfully prescribed course of his valuable statutory right to an appeal. He could not have appealed on April 9, or thereafter within the three months, because, to have done so, would have worked an abandonment of his motion to modify.

In other words, on April 9, it would not have been at all important, to the ends of justice, to have disregarded the

said rule of the common law and relieved respondents of the necessity for thereafter filing another notice of appeal. And the fact that they did not, cannot, in the light of that rule, help them any now.

Respondents were advised on July 25 (when petitioner's motion was entertained and overruled in the trial court) that the District Court disagreed with the view that their appeal was valid.

Therefore, we urge that the application of that common law rule itself automatically determines the proper disposition of both of the motions to dismiss the said appeals.

Conclusion

It is, therefore, respectfully contended that this case is one calling for the exercise by this Court of its supervisory powers in order that the rulings of the Court of Appeals, respecting its jurisdiction of said cross-appeal and of said main appeal, may be examined here; and that, to such an end, writs of certiorari should be granted, as prayed, for a review of the said rulings.

Respectfully submitted

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St. Louis, Mo.
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